IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-372

L. V. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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L. V. Johnson, petitions for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion (order) of the Court of Appeals is not yet reported and same is appended as Group Appendix A, *infra*.

JURISDICTION

The Opinion (order) of the Court of Appeals for the Seventh Circuit affirming the conviction and sentence was entered on July 11, 1979. A timely petition for rehearing was filed, same being denied on the 10th day of August, 1979.[1] This petition is filed within thirty (30) days of that date and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the warrantless nighttime entry into a motel room on less than probable cause, to arrest unknown persons, was in defiance of the Fourth Amendment . . . especially where the trial court expressly took the view that the entry into the motel room was similar to a car stop . . . as opposed to a home?

(a) Whether the warrantless entry onto private premises to arrest and or search is of exceptional importance in light of the Court's express reservation of the issue, cf., *U.S. v. Santana*, 427 U.S. 38 (1976); *U.S. v. Watson*, 423 U.S. 411, 418, n. 6 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113, n. 13 (1975); and *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)?

[1] The order affirming is set forth as Group Appendix A, *infra*. The order denying rehearing is reproduced as Appendix B, *infra*. On August 20, 1978 the Court of Appeals stayed petitioner's mandate pending disposition of certiorari. The government had no opposition to same (Appendix C, *infra*).

(b) Whether the question is of exceptional importance in light of the split in circuits (*U.S. v. Reed*, 572 F.2d 412 (C.A. 2, 1978) and *U.S. v. Prescott*, 581 F.2d 1343 (C.A. 9, 1978) . . . finding suppression to be the answer while in this case the Seventh Circuit finds to the contrary)?

2. Whether the trial court erred in granting summary judgment in favor of the government where, during the pendency of the direct appeal, the petitioner filed a verified 2255 petition alleging ineffective right of counsel based upon trial counsel's refusal to call a critical witness . . . where the attorney claimed to the petitioner that the witness could not be called because of an "inter office conflict of interest"?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2255, in part, states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

L. V. Johnson (hereafter petitioner) was indicted in Chicago in March, 1977. The two (2) count indictment[2] charged petitioner with conspiring to sell heroin on January 12, 1977 (Count I) and with distributing approximately two (2) ounces of heroin on January 12, 1977 (Count II). Each count was claimed to violate 21 U.S.C. § 841(a)(1) and § 846.[3] Petitioner, was enlarged on bond and represented by private counsel.

Petitioner was tried to the Court commencing November 28, 1977. The government's proof indicated that prior to January 12, 1977, Chicago-DEA was utilizing an informer named Fisher (Tr. 14-16). During the afternoon of January 12, 1977, DEA gave the informer $2400.00, and the informer went to the home of Horton (Tr. 16). At about 9:30 p.m. the informer and Horton drove to a motel in Chicago where Horton went into the motel and came out with two (2) ounces of heroin. Horton gave the informer the two (2) ounces of heroin and about 11:00 p.m. the informer left Horton and gave a DEA agent the two (2) ounces of heroin that came from Horton (Tr. 16-18, 19-20, 27, 55). After the DEA agent

[2] Petitioner reproduces the indictment, 77 CR 33, as Grp. App. D, *infra*.

[3] In pertinent part, 21 U.S.C. § 841(a)(1) reads:

"(a) except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) . . . distribute, or dispense, . . . a controlled substance;"

In pertinent part, 21 U.S.C. § 846 reads:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

received the heroin—the receiving agent called his fellow surveillance agents advising them that the informer had delivered to him a small quantity of heroin (Tr. 20, 27).

The government presented the testimony of *Agent Hill.* He saw Horton enter and exit the motel room at about 10:20 p.m. on January 12, 1977 (Tr. 53-55). Thereafter Hill spoke to other DEA agents that were at the motel and "we decided to enter the room" around 11:15 p.m. (Tr. 55-57). Hill had no search warrant and observed no crimes. As to the reason that Hill entered the motel room, absent a warrant, the following appears of record:

> "Q. *Then the only basis for your effectuating an entrance of that room was an order from a superior?*
> A. *That is correct.*
> Q. The same would apply to Agent Weinstein and Fullett; is that correct?
> A. I don't know." (Tr. 73)

The entry into the room was effected by using a lady that had just exited the room to knock on the door. Upon the door being opened the lady (and a man, both used as a guise to enter the room) were pushed aside (Tr. 67-68).

DEA *Agent Weinstein* testified that he was at the same motel and at approximately 11:15 p.m. he was listening at the door of Room 233 and he heard a male voice say 'Hey, man, we're done. Let's get out of here." (Tr. 87). After that *Agent Weinstein* went back to his car, then *several minutes later* returned and entered the motel room where he assisted in the arrest of seven (7) or eight (8) men and a woman (Tr. 87).[4]

[4] Why *Weinstein* and his fellow agents didn't simply wait by the door for the parties to exit the room escapes our imagination in light of what he had heard . . . *"we're done, let's get out of here"* (Tr. 87).

Fisher, the DEA informer, testified that on January 12, 1977, after meeting with the DEA agent . . . he went to Horton's home (Tr. 106-07). About 9:30 p.m. Fisher and Horton left for the motel (Tr. 117). Once at the motel Fisher watched Horton walk into Room 233 of that motel and return with what later turned out to be two (2) ounces of heroin (Tr. 118). After that Fisher and Horton left and returned to Horton's home (Tr. 119). Eventually Fisher left Horton's home somewhere around 11:00 p.m., met with two (2) DEA agents and gave them both the "package" and a non-functioning body recorder (Tr. 119).

After the testimony of Fisher the government rests and the court proceeds to hear argument both on the question of suppression and on a motion for judgment of acquittal (Tr. 129-152). *Inter alia,* the court denies the motion to suppress, reasoning:

> "In this court's opinion, there was probable cause to enter the motel room at the time that it was done; and as to why there was not a warrant, the testimony as to the conversation, '*Hey, man, we are done. Let's get out of here.*' I consider the positive test for heroin, and I consider the fact, without saying how I would have ruled if it were a permanent home, I am not going to reach out for rulings and matters that are not before me for decision; *but this was a motel room, and this may be a degree of similarity or parallel to the search of an automobile without a warrant. An automobile is movable. A motel room is temporary quarters, as distinguished from a rented apartment or from a home.*" (Tr. 141)[5]

[5] The trial court, at the suggestion of petitioner's counsel, combined both the trial and the suppression question (Tr. 2). This practice was specifically condemned in *U.S. v. Payner,* 572 F.2d 144 at 145-146 (C.A. 6, 1978).

The petitioner offered his own testimony (Tr. 234-265) as well as the testimony of others that were in the motel room at the time DEA entered (warrantless and at gunpoint]. The thrust of the defense evidence was that there was an *on-going gambling game* (Tr. 183-5; 199-200; 235-6). Petitioner further testified that he made no oral admissions post-arrest, to DEA. Petitioner's Appendix E, *infra*, is the original complaint filed before the federal magistrate on January 13, 1977. There is *no indication* within the magistrate's complaint of *any oral admissions by petitioner* (cf., Appendix E, *infra*).

On November 29, 1977, the Court, following argument, finds that there was no dice game and that petitioner was guilty (Tr. 337-338). On January 12, 1978, petitioner was sentenced to two (2) years in custody (R. 21). Petitioner was enlarged on bond pending appeal and the Court of Appeals stayed its mandate pending disposition of this petition (App. C, *infra*).

During the *pendency* of the direct appeal (78-1101, C.A. 7) petitioner filed a verified § 2255 petition (App. F, *infra*). Same was filed with the trial judge on July 8, 1978. The proceedings in the Court of Appeals were stayed pending disposition of the § 2255 petition. The gravamen of this petition was that the 6th Amendment was thwarted as to the petitioner at bar . . . in that he was denied the opportunity to call a critical defense witness . . . by virtue of *trial counsel's* refusal to call the defense witness . . . because of a "conflict of interest" (R. 5-6, rec. #78-2635, C.A. 7). Thus, the petitioner charged, that he was denied the effective assistance of counsel in that his trial counsel was ineffective . . . for refusing to call a key and critical defense witness . . .

not as a trial tactic . . . but because of a conflict of interest.[6]

The Government filed a motion for summary judgment (R. 7-8, #78-2635). The Government filed no counter-affidavit(s). The Court granted the government's motion. On December 4, 1978 . . . the trial court dismissed the verified § 2255 absent any hearing . . . characterizing the action taken as the grant of a summary judgment against petitioner (R. 12-13, #78-2635). On consolidated appeal . . . the Court of Appeals affirmed the § 2255 dismissal . . . absent any hearing. In that Petitioner deems the dismissal contrary to law . . . this Petition requests review and reversal.

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[6] Petitioner wanted to call Mr. Horton . . . the alleged seller of Heroin to the DEA informer as his witness (R. 5, 6). Horton was available to be called (Tr. 108-111). Petitioner's trial counsel told petitioner the conflict of interest precluded calling Horton as a defense witness (R. 5-6, 78-2635). Horton had been tried, convicted and sentenced. *USA v. Horton*, ... F.2d ..... #77-2187 (C.A. 7, 1979). Horton's trial counsel as well as Petitioner's trial counsel shared office(s) in Chicago as did petitioner's previous trial counsel in the same case (R. 6, 78-1101). *In simple words . . . Horton's and Petitioner's Attorneys were all from the same office.*

REASONS FOR GRANTING THE WRIT

1.

Whether the warrantless nighttime entry into a motel room on less than probable cause, to arrest unknown persons, was in defiance of the Fourth Amendment . . . especially where the trial court expressly took the view that the entry into the motel room was similar to a car stop . . . as opposed to a home?

(a) Whether the warrantless entry onto private premises to arrest and/or search is of exceptional importance in light of the Court's express reservation of the issue, cf., *U.S. v. Santana*, 427 U.S. 38 (1976); *U.S. v. Watson*, 423 U.S. 411, 418, n. 6 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113, n. 13 (1975); and *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)?

(b) Whether the question is of exceptional importance in light of the split in circuits (*U.S. v. Reed*, 572 F.2d 412 (C.A. 2, 1978) and *U.S. v. Prescott*, 581 F.2d 1343 (C.A. 9, 1978) . . . finding suppression to be the answer while in this case the Seventh Circuit finds to the contrary).

The exceptional importance of the questions presented is demonstrated by both the split in circuits and the Courts' reservation on the questions now presented. In *Gerstein v. Pugh*, 420 U.S. at 114, n. ___, 95 S.Ct. 854 at 863, n.13, the Court observed:

> "The issue of warrantless arrest that has generated the most controversy, and that remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U.S. 443, 474-481, 91 S.Ct. 2022, 2042-2045, 29 L.Ed. 564 (1971); *id.*, at 510-512 and n. 1, 91 S.Ct. at 2060-2061 (White, J., dissenting); *Jones v. United States*, 357 U.S. 493, 499-500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958)."

Similarly, in *U.S. v. Watson*, 423 U.S. at 418, n. ___, 96 S.Ct. at 825, n.6 (1976) the Court noted:

> "In the case before us the Court of Appeals relied heavily, but mistakenly, on *Coolidge v. New Hampshire*, 403 U.S. 443, 480-481, 91 S.Ct. 2022, 2045-2046, 29 L.Ed.2d 564 (1971), for as we noted in *Gerstein v. Pugh*, 420 U.S., at 113 n. 13, 95 S.Ct., at 863, the still unsettled question posed in that part of the *Coolidge* opinion was "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Watson's midday public arrest does not present that question."

In *U.S. v. Prescott*, 581 F.2d 1343 (C.A. 9, 1978) the court reversed a conviction under charges brought pursuant to 18 U.S.C. § 3. While discussing the agents' warrantless entry into Prescott's premises, that court stated:

> *"The Supreme Court has never resolved this issue.* It has held that police need no warrant to arrest a felony suspect on probable cause in a public place; *United States v. Watson*, 1976, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598; *United States v. Santana*, 1976, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300. However, the Court has expressly reserved, on numerous occasions, the "grave constitutional question" of whether an "entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." [Cites omitted] In *Coolidge* the Court stated in *dicta* that "the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate

> is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' 403 U.S. 477-78, 91 S.Ct. 2044" (581 F.2d at 1348).

In *U.S. v. Reed*, 572 F.2d 412 (C.A. 2, 1978) the Court reversed a federal drug conviction. The Court, on appeal, found that the seizure of certain evidence was impermissible. The evidence was obtained based on a warrantless entry onto private premises for the purpose of arresting Ms. Reed. While reversing the court noted:

> "The central question presented by this case, of course, is not whether the agents had statutory authority to make probable cause arrests, nor is it whether the method of entry into *Reed's* apartment was within the agents' statutory powers; rather, THE QUESTION IS THE CONSTITUTIONALITY OF THE ENTRY ITSELF" (572 F.2d at 518, n. 2).

The text of the *Reed* decision speaks also to statutory authority as follows:

> "The question thus presented is whether and under what circumstances the Fourth Amendment permits federal law enforcement officers to enter a suspect's home in order to effect a felony arrest for which the officers have both *statutory authority* and probable cause but no warrant. *Surprisingly, neither the Supreme Court nor the Second Circuit has squarely decided this issue.* We hold that warrantless felony arrests by federal agents effected in the suspect's home, in the absense of extigent circumstances, even when based upon statutory authority and probable cause, are unconstitutional" (572 F.2d at 417-18, ft.nts. omitted; emphasis supplied).

Of course, as the statement of facts offers, petitioner and others were in a motel room during the late evening

hours of January 12, 1977. The trial judge *likened* the entry to a car-stop (Tr. 141). The trial judge declined to offer his thoughts on what the situation would be had the entry, arrest and search . . . taken place in a private home. The trial Judge in this case stated:[1*]?

> "and I consider the fact, *without saying how I would have ruled if it were a permanent home, I am not going to reach out for rulings and matters that are not before me for decision; but this was a motel room, and this may be a degree of similarity or parallel to the search of an automobile without a warrant. An automobile is movable. A motel room is temporary quarters, as distinguished from a rented apartment or from a home.*" (Tr. 141) (emphasis ours)

As may be clear . . . the trial court was incorrect and the court of appeals perpetuated the constitutional error . . . notwithstanding their contrary decision in *U.S. v. Griffith*, 537 F.2d 900 (C.A. 7, 1976). In *Griffith* the court reversed a federal drug conviction and reviewed this Court's decisions as they relate to searching motel-hotel rooms. The *Griffith* court cited:

> "The government suggests that it was proper for the officers to gather together defendant's belongings and take them to the police station, inventorying them in the process, just as if he had been arrested on the street with those belongings in his possession. This presupposes that for purposes of the application of the *Fourth Amendment the motel room is not to be viewed as a dwelling.* The Supreme Court has held otherwise. *Stoner v. California*, 376 U.S. 483-490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); *United States v. Jeffers, supra*, 342 U.S. at 51-52, 72 S.Ct. 93; *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). The officers had no greater right to remove or *search defendant's personal belongings that were not on his person or within his immediate control than they would have if*

they had made the arrest in his house." (537 F.2d at 905; emphasis supplied)

When the agents made their night-time-warrantless entry over an hour had passed from the time Horton left the motel room (Tr. 19-20, 27, 55). The agents had no knowledge *who* was in the motel room . . . or whether the $2400.00 in pre-recorded money . . . was still there.[7] After Horton left the motel . . . unidentified persons were seen entering and leaving the same motel room (Tr. 67-68).

The inquiry then is simply whether the warrantless, night-time and unannounced entry into the motel room to arrest unknown persons and search for unknown things was legal. Our answer is in the *negative.* WE URGE THIS COURT TO BE MINDFUL THAT THE GOVERNMENT HAD ABSOLUTELY NO INFORMATION THAT THERE WERE OTHER NARCOTICS IN THE MOTEL ROOM (IF THERE WERE ANY AT ALL) OR, ANY EVIDENCE OF ANY CRIME IN THAT MOTEL ROOM.[8]

In *U.S. v. Killebrew,* 560 F.2d 729 (C.A. 6, 1977) the court reversed a federal firearms conviction finding that the trial court erred in refusing to suppress evidence seized following the warrantless entry into a motel room. While reversing the *Killebrew* court reasoned:

[7] The informer, Fisher, had been given $2400.00 in pre-recorded money by DEA during the afternoon of Jan. 12, 1977 (Tr. 16). None of the agents knew that the $2400 was even *arguably* in the motel room in that no one witnessed *Horton* getting the 2 ounces of heroin (Tr. 30-38).

[8] In *U.S. v. Anderson,* 533 F.2d 1210 (D.C. Cir., 1976) the Court reversed a weapons conviction based upon an impermissible seizure of certain evidence and observed that the question posed to this Court has yet to be ruled on by the Supreme Court (533 F.2d 1214 at n.6).

"If the entry into the motel room is characterized as an entry for purposes of effectuating an arrest, as opposed to any entry for purposes of conducting a search, the warrantless entry under the facts of the present case violate the Fourth Amendment rights of *Killebrew. United States v. Shye,* 492 F.2d 886 (6th Cir., 1974); *Vance v. State of North Carolina,* 432 F.2d 984 (4th Cir., 1970); *Dorman v. United States,* 140 U.S. App. D.C. 313, 435 F.2d 385 (1970). The result is the same if the warrantless entry is characterized as for the purpose of conducting a search, as opposed to an entry for the purpose of making an arrest. The facts of the present case do not come within any of the well delineated exceptions to the fourth amendment requirement for a search warrant. See *United States v. Chadwick,* ..... U.S. ....., 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *United States v. Murrie,* 534 F.2d 695 (6th Cir., 1976); *United States v. Stoner,* 487 F.2d 651 (6th Cir., 1973); *United States v. Nelson,* 459 F.2d 884 (6th Cir., 1972)." (560 F.2d at 733)

Thus, the 6th circuit has joined the 2nd and 9th circuits, in denouncing warrantless entries to arrest and/or search. This Court has not passed on the questions (Qu. 1(a)(b)) presented herein. Under the questions presented we respectfully urge that Certiorari be granted.[9]

* * * * *

2.

Whether the trial court erred in granting summary judgment in favor of the government where, during the

[9] The Courts' decisions in *Mincy v. Arizona,* ..... U.S. ....., 98 S.Ct. 2408 (1978) and *Dunaway v. New York,* ..... U.S. ....., 99 S.Ct. 2248 (1979) make no reference to the warrantless entry-arrest-search-trilogy . . . as offered in this petition.

pendency of the direct appeal, the petitioner filed a verified 2255 petition alleging ineffective right of counsel based upon trial counsel's refusal to call a critical witness . . . where the attorney claimed to the petitioner that the witness could not be called because of an "inter office conflict of interest"?

The petitioner sought § 2255 relief.[10] Specifically, petitioner requested a hearing before the trial court on matters not set forth in the trial record. Petitioner bottomed his claim on the 6th Amendment. Petitioner claimed he suffered the vice of "ineffective counsel" by virtue of trial counsel depriving him of a critical witness. That witness, *Horton*, played a key role in the January 12, 1977 episode. As already portrayed Horton was with the informer from the middle-afternoon . . . on that date . . . until the late evening hours. Horton went into the motelroom and came out with the 2 ounces of heroin. Horton gave the heroin to the informer. Horton also gave the $2400.00 in pre-recorded monies to someone in the motelroom. One of the persons arrested in that motelroom, *Adams*, had $1600.00 of the pre-recorded monies while petitioner was in possession of $520.00 commingled with other monies (Tr. 94, 98-99). All told DEA arrested everyone in the motelroom (some 8 persons . . . Tr. 61). Only petitioner was indicted.[11] Dur-

[10] In *Giglio v. U.S.*, the Court, *Sub Silentio*, approved attacking the conviction collaterally . . . during the pendency of the direct appeal, 405 U.S. at 152-153, 92 S.Ct. at 765 (1972). Petitioners post-conviction pleadings were invoked under both § 2255 and rule 33 (App. F, *infra* and R. 5-6, #78-2635).

[11] Horton was separately indicted. His conviction was recently affirmed, *U.S. v. Horton*, ... F.2d ..... (C.A. 7, 1979, #77-2187 . . . decided July 2, 1979), (pet. rehg. pending).

ing the motelroom search several thousand dollars were taken by DEA (Tr. 292-295).

During the preliminary hearing (January 20, 1977) petitioner was represented by attorney Genson.[12]

Post indictment petitioner was represented by attorney S. Adams[13] however, on April 14, 1977 Adams was given leave to withdraw in favor of attorney L. Fox.[14] We add, at this point, that *Horton*, while separately indicted, was represented by attorney Ms. A. Hubbard.[15] *Horton* did not appear as a defense witness. Petitioner was convicted on November 29, 1977 and was sentenced on January 12, 1978 (R. 21 . . . 78-1101). On January 26, 1978 petitioner sought post trial relief (R. 23 . . . 78-1101).[16] On February 3, 1978 petitioner sought bail pending appeal (R. 1 . . . 78-2635). An exhibit to the motion for bond pending appeal is a formal motion in the district court under *78 CR 34* wherein James Dunn is asking for the return of several thousand dollars. That money was seized in the motel room upon the arrest of petitioner and the others on the night of January 12,

[12] Offices at 134 North LaSalle St., Suite 300-306, Chicago, Il. 60602.

[13] Offices at 134 North LaSalle St., Suite 300-306, Chicago, Il. 60602.

[14] Offices at 134 North LaSalle St., Suite 300-306, Chicago, Il. 60602. (R. 6, 78-1101).

[15] Offices at 134 North LaSalle St., Suite 300-306, Chicago, Il. 60602. Horton's appeal is before the court in 77-2187 (7th Cir., Pet. Rehearing pending).

[16] Attorney Genson filed said motion for petitioner. Attorney Fox now seems to be out of the picture. Johnson's Notice of Appeal is "pro se" although the address on the Notice of Appeal is the mutual address of each defense attorney in these cases (R. 22, . . . 78-1101).

1977.[17] Against this background . . . a hearing, in accordance with 28 U.S.C. § 2255 was requested. Same was denied in the trial court and the Appellate Court affirmed (App. A. 4, 5). The denial of any hearing was manifest error.[18] In *Machibroda v. U.S.*, 368 U.S. 483 (1962) the Court vacated the denial of § 2255 relief where the trial court dismissed the motion and affidavit, absent any hearing. The Court, by Justice Stewart, stated:

> This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.
>
> * * * * *

[17] Dunn under 77 CR 34 was not indicted. Attorney Genson represented *Dunn* on the motion for the return of the money. (R. 1, Exh. A . . . 78-2635). In *United States v. Gaines*, 529 F.2d 1038 (7th Cir. 1976) this court granted *Gaines* a new trial based on "conflict of interest". Judge Tone pointed out that some of the post-trial motions in that case apparently had the same typing and the same Blueback (529 F.2d at 1042). In this case each and every motion filed was seemingly typed with the same typewriter and the address for each attorney is the same. (R. 5, 16, 19, 22, 23 and 24 . . . 78-1101; R. 1 . . . 78-2635).

[18] The trial Court's decision granting the government's motion to dismiss and treating the motion to dismiss as a motion for summary judgment is reproduced as App. G, *infra*. The trial Court was *clearly erroneous* in granting *summary judgment* where the petitioner's verified § 2255, with a second affidavit attached (R. 5-6, #78-2635) put facts in issue that clearly *didn't occur within the Courtroom . . ., in accord., U.S. v. Diebold Inc.*, 369 U.S. 654 at 655 (1962) (granting summary judgment *improper* where pleadings raised material factual questions, Rule 56, Fed. R. Civ. Proc.).

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Walker v. Johnson*, 312 U.S. 275, at 287, 61 S.Ct. 574, 579. (363 U.S. at 494-494)

The circuits have almost uniformly interpreted *Machibroda* as requiring an evidentiary hearing. Petitioner's pleadings . . . verified . . . that his trial counsel refused to call a defense witness . . . based on a conflict of interest (R. 5-6). The petitioner named that witness and there is no dispute as to the fact that the witness was available.[19] The petition (verified) spoke to the "ineffective counsel" question. The 6th amendment was pleaded.[20] The Government didn't contradict the factual allegations (R. 7-8, #78-2635). THE GOVERNMENT SOUGHT DISMISSAL AND SUMMARY JUDGMENT BASED ON "TRIAL TACTICS" which were *without any support whatsoever* in the trial record (Cf., R. 7-8).

In *U.S. v. Marzgliano*, 588 F.2d 395 (C.A. 3rd, 1978) the court vacated the denial of § 2255 relief, absent a

[19] The petitioner, in the court below, offered no statement as to what Horton might have testified to . . . this is hardly fatal. A § 2255 hearing cannot be denied for this reason, *U.S. v. Friedman*, 588 F.2d 1010 at 1017 (C.A. 5, 1979).

[20] The Court recently resolved these 6th amendment cases . . . without compelling the petitioner(s) to show prejudice . . . *Geders v. U.S.*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Hollaway v. Arkansas*, 435 U.S. 475 (1978). Each of the above demonstrated that the constitutional violation under the 6th amendment required no showing of prejudice. (Cf., *Davis v. Alabama*, 596 F.2d 1214, CA. 5, 1979) (analyzing 6th amendment right to effective counsel).

hearing where that petitioner alleged his guilty plea was wrongfully induced by his retained counsel. While remanding for an evidentiary hearing the court stated:

> The alleged misrepresentations which form the basis of Mogavera's section 2255 motion took place at out-of-court meetings between *Mogavera and his attorney.* Also, the fact that no agreement actually existed between the district court judge and Mogavera's attorney, a fact which would be within the personal knowledge of the district court, is not relevant to the issue of whether or not Mogavera's guilty plea was induced by a false promise from his attorney. *McAleney v. United States, 539 F.2d at 284. Thus, by alleging activities which took place outside the courtroom and beyond the personal knowledge of the district court judge, Mogavera brings himself squarely within the Machibroda* standards. *Accord, Brown v. United States,* 565 F.2d 862, 863 & n.2 (3d Cir. 1977); *Moorhead v. United States,* 456 F.2d at 995 (petitioner is entitled to a hearing where the motion alleges 'matters outside the record which, if true, cast serious doubt upon the voluntariness of the guilty plea'." (588 F.2d at 399, emphasis supplied)

In *U.S. v. Guerra,* 588 F.2d 519 (C.A. 5, 1979) the court vacated the denial of § 2255 relief absent any hearing. The issue offered on 2255 related to effective right to counsel under the 6th amendment. While vacating and ordering an evidentiary hearing the Court noted:

> "We begin our discussion by heeding the legislative command that the district court shall conduct a hearing on a petitioner's allegations '[u]nless the motion and the files and records of the case *conclusively show* that the prisoner is entitled to no relief.' 28 U.S.C.A. § 2255" (emphasis supplied). (588 F.2d at 520)
>
> * * * * *
>
> "Because petitioner raises serious questions as to the effectiveness of his counsel at trial, we reverse

> and remand for a full hearing on the merits of his allegations.
>
> The *Sixth Amendment* guarantees a defendant in a federal criminal trial the right to 'counsel reasonably likely to render and rendering reasonably effective assistance.' Where, as in the present case, the defendant is represented by retained counsel, in order to establish a Sixth Amendment violation it must be shown that the incompetency of retained counsel was so obvious that a reasonably attentive government official connected with the criminal proceeding should have been aware of it and could have taken corrective action." (588 F.2d at 521, cites omitted)

In *Friedman v. U.S.,* 588 F.2d 1010 (C.A. 5, 1979) the court vacated and remanded for *full* evidentiary hearings from the denial of § 2255 relief after that petitioner filed verified pleading setting forth shortcomings by his appointed trial counsel. The Court, while remanding for full hearings offered the following expressions:

> "In this case, the limited hearing conducted by the District Court on petitioner Leroy Friedman's § 2255 motion was *not adequate to conclusively determine his claims that he had been tried and convicted without the reasonably effective assistance of counsel guaranteed him by the Sixth Amendment.* We therefore vacate and remand this cause to the District Court to consider it again after having conducted a fuller evidentiary hearing." (588 F.2d at 1012)
>
> * * * * *
>
> "Where, however, the petitioner supports his claims of inadequate preparation, attorney indifference, *failure to call witnesses,* etc., *with plausible factual allegations* and evidence sufficient to raise a substantial doubt that his attorney's in-court performance was not as effective as it might seem to

third-party observers, the court is obligated to delve behind the scenes and ascertain whether the attorney, either by inaction or through ill-taken action, failed to meet the standards of a reasonably competent and devoted advocate, to the ultimate prejudice of the petitioner." 588 F.2d at 1016, emphasis supplied)

In *U.S. v. Disston*, 582 F.2d 1108 (C.A. 7, 1978) the court vacated and remanded for full evidentiary hearings where that petitioner alleged that government misconduct precluded him from receiving a fair trial. While reversing the dismissal of § 2255 relief, absent any hearing, the court noted:

> Whether with an evidentiary hearing Disston can demonstrate any prejudice which he could not with only the tapes themselves remains to be seen. We are concerned at the present moment with his having the opportunity to try. (582 F.2d at 1111, emphasis supplied)

In *Lindhorst v. U.S.*, 585 F.2d 361 (C.A. 8, 1978) the Court vacated the denial of § 2255 relief absent any evidentiary hearing where that petitioner raised government misconduct in suborning perjury during his bank robbery trial.

> "Neither the motion nor the files and records of the instant case 'conclusively show that the prisoner is entitled to *no* relief.' 28 U.S.C. § 2255 (1970). The motion specifically alleges with supporting affidavits government use of perjured material testimony with knowledge of its falsity." (585 F.2d at 365)
>
> * * * * *
>
> "This is not the kind of case which the district judge 'could completely resolve by drawing upon his own personal knowledge or recollection' *Machobroda v. United States*, 368 U.S. at 494, 82 S.Ct. at 514. The district judge cannot credit the recanting witnesses' trial testimony and discredit their affidavits without affording appellant an opportunity to prove the allegations. *An evidentiary hearing is required to determine whether the government knowingly used perjured material testimony.*" (585 F.2d at 365, emphasis supplied)

We have pointed out that under the precedent(s) of this Court *Machibroda* and those cases from the 3rd, 5th, 7th and 8th circuits . . . the petitioner at bar was deprived of that which is mandated . . . an evidentiary hearing. Petitioner has not offered a frivolous issue. Rather, an issue that strikes at the very heart of any federal criminal trial . . . witnesses . . . for the defense.

CONCLUSION

The Petitioner at bar, L. V. JOHNSON, respectfully prays that the Court grant his petition for certiorari as to each question presented.

Respectfully submitted,

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100 North LaSalle Street
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Chicago, Illinois 60602
(312) 332-2863

Attorney for Petitioner

APPENDICES

GROUP APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

[Unpublished Order Not To Be Cited Per Circuit Rule 35]

Argued: May 31, 1979
July 11, 1979.

Before

Hon. Luther M. Swygert, *Circuit Judge*
Hon. Walter P. Gewin, *Senior Circuit Judge*•
Hon. Robert A. Sprecher, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 78-1101 and 78-2635 vs.

L. V. JOHNSON,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 CR 33—Alfred Y. Kirkland, *Judge.*

ORDER

Defendant L. V. Johnson was indicted for a conspiracy to distribute, and for distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846. After a bench trial de-

• Honorable Walter P. Gewin, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

fendant was found guilty and was sentenced to two years imprisonment followed by a three year special parole term. He has appealed on the grounds (1) that evidence resulting from a warrantless search of a hotel room should have been suppressed; (2) that defendant's written jury waiver was invalid; and (3) that the evidence was insufficient.

Thereafter defendant filed a petition under 28 U.S.C. § 2255 claiming ineffective assistance of counsel, which the trial judge disposed of by means of a summary judgment for the government. The defendant also appealed from this judgment and the two appeals have been consolidated. We affirm.

I

On January 12, 1977, Drug Enforcement Administration Agent Labik, after searching informant Fisher and confirming the absence of narcotics, money or weapons, placed a kel set electronic transmitter on Fisher's body and gave him $2,400 in pre-recorded funds.

Fisher went to the home of Willie Horton, an unindicted conspirator, from whence Horton made a telephone call to Room 233 at Michigan Inn Motel and counted Fisher's $2,400. Horton and Fisher then drove to the motel, where Horton proceeded to Room 233, remained in the room for a few minutes and returned to Fisher, waiting in the automobile, with two ounces of heroin. Fisher gave Horton the $2,400, which Horton took back to Room 233. Horton returned to the car and he and Fisher went back to Horton's house.

Fisher examined the package of heroin, departed, and met with D.E.A. agents, who field tested the heroin with positive results. Several agents who had maintained surveillance of Room 233 then approached the room, where they heard a male voice inside say, "Hey man, we're done. Let's get out of here." The agents saw two persons, one a woman, emerge from Room 233 and persuaded one of them to seek readmittance. The woman knocked on the door and when it opened the agents entered.

The room contained seven men and one woman, including the defendant, who had drawn a gun from his pocket but threw it on the floor as the agents entered. The agents arrested the eight occupants of 233 and upon searching the room found several plastic bags with narcotics and several thousands of dollars in money. The defendant was searched at the time of his arrest and had in his possession $520 of the pre-recorded funds.

After receiving Miranda warnings, the defendant signed a waiver of rights form and told the agents: "I know it was Willie who set me up because he is the only one I sold to tonight."

II

The defendant first argued that the evidence seized should have been suppressed. At defense counsel's suggestion and agreement of the parties the motion to suppress was heard simultaneously with the bench trial.

Congress has empowered D.E.A. Agents to:

> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;
>
> (4) make seizures of property pursuant to the provisions of this subchapter; . . .

21 U.S.C. § 878. See also, 26 U.S.C. § 7607.

The agents had probable cause and there were exigent circumstances sufficient to make the arrests and the subsequent search of the room and the defendant. *United States v. Lozaw*, 427 F.2d 911 (2nd Cir. 1970); *United States v. Frierson*, 299 F.2d 763 (7th Cir. 1962) (unannounced but peaceful entry warranted where agents heard "Get rid of the stuff" from inside apartment). There was scarcely time to procure a warrant once the voice from the motel room announced, "Let's get out of here." A quick

disposition of narcotics and even of the marked money became quite probable.

III

The next argument of defendant was that the written jury waiver was invalid.

The written waiver was signed by the defendant, his counsel, government counsel and the court on November 28, 1977. On August 31, 1978, we held in *United States v. Scott,* 583 F.2d 362, 364 (7th Cir. 1978) that effective one month after the date of that decision we would require that before a district court accepts a waiver of jury trial the court should interrogate the defendant to insure that he understands his right to a jury trial and the consequences of waiver. In *Scott* however, we also held on the basis of *Estrada v. United States,* 457 F.2d 255 (7th Cir. 1972) and *United States v. Kidding,* 560 F.2d 1303 (7th Cir. 1977) that until 30 days after August 31, 1978, the Seventh Circuit did not require such interrogation when a written waiver was filed. Thus the old rule applied when this defendant filed his waiver.

IV

The defendant contended that he was deprived of a fair trial because of his trial counsel's apparent conflict of interest. This conflict was alleged to exist because the defendant wished to call Willie Horton as a witness, defendant's counsel "refused" to do so, and Horton's lawyer maintained an office in the same suite of offices as did defendant's counsel. It is common knowledge in this legal community that many criminal defense attorneys maintain offices in the same suite with other defense attorneys yet are completely independent and unaffiliated.

We begin with a presumption that counsel was conscious of his duties and that he sought conscientiously to discharge those duties. *Matthews v. United States,* 518 F.2d 1245 (7th Cir. 1975). Alleged failure to call a witness is a

question of trial tactics which is not sufficient to establish ineffective assistance of counsel. *United States ex rel. Williams v. Twomey,* 510 F.2d 634, 640 (7th Cir. 1975). Defendant did not make a sufficient showing to warrant an evidentiary hearing on the subject.

Finally the defendant has argued that the evidence was insufficient to support his conviction. We have examined the record as well as the briefs and find that the conviction is supported by substantial evidence.

The judgments appealed from are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
August 10, 1979

Before
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Walter P. Gewin, *Senior Circuit Judge*•
Hon. Robert A. Sprecher, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 78-1101 and 78-2635 vs.

L. V. JOHNSON,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 CR 33—Alfred Y. Kirkland, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by L. V. Johnson, defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, Denied.

• Honorable Walter P. Gewin, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
August 20, 1979

Before
Hon. Luther M. Swygert, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 78-1101 and 78-2635 vs.

L. V. JOHNSON,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 CR 33—Alfred Y. Kirkland, *Judge.*

On consideration of the "Unopposed Motion, With Supporting Affidavit, As Per Cir.R. 17(a) To Stay Mandate Pending The Timely Filing Of A Petition For Writ Of Certiorari (Same To Be Filed With The Clerk Of The Supreme Court On Or Before September 10, 1979)" filed herein on August 15, 1979, by counsel for the defendant-appellant,

It Is Ordered that said motion be and the same is hereby Granted, and the mandate of this court is stayed up to and including September 10, 1979, pending the filing of a petition for a writ of certiorari in the Supreme Court by the defendant-appellant.

GROUP APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 77 CR 33

UNITED STATES OF AMERICA

v.

L. V. JOHNSON

Violation: Title 21, United States Code,
Sections 841(a)(1) and 846

The March 1977 Grand Jury charges:

Beginning on or about January 12, 1977, and continuing thereafter up to and including the filing of this indictment, at Chicago, in the Northern District of Illinois, Eastern Division, L. V. Johnson, defendant herein, wilfully and knowingly did combine, conspire, confederate and agree together, with Willie Horton, named as an unindicted co-conspirator, but not as a defendant herein, and with divers other persons who are to the grand jury unknown, to commit an offense against the United States, to wit: to knowingly and intentionally distribute a quantity of a mixture containing heroin, a Schedule I Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

It was part of said conspiracy that the defendant would cause to be distributed and did distribute at Chicago, in the Northern District of Illinois, a quantity of a mixture containing heroin.

It was further a part of said conspiracy that the defendant would misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, the purposes of and acts done in furtherance of said conspiracy.

In furtherance of said conspiracy and to effect the objects thereof, at the times hereinafter mentioned, the defendant would and did commit the following:

OVERT ACTS

1. The grand jury realleges and incorporates by reference the acts set forth in Count Two of this indictment, as though fully set forth herein as overt acts.

2. On or about January 12, 1977, at Chicago, the defendant had a meeting with Willie Horton.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

The March 1977 Grand Jury further charges:

On or about January 12, 1977, at Chicago, in the Northern District of Illinois, Eastern Division, L. V. Johnson, defendant herein, knowingly and intentionally did distribute approximately .22 grams of a mixture containing heroin, a Schedule I Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

A True Bill:
/s/ George O. Weiner
Foreman

/s/ Samuel K. Skinner
United States Attorney
SKS:ja

GROUP APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 77 CR 33

UNITED STATES OF AMERICA

v.

L. V. JOHNSON and FRANK ADAMS

COMPLAINT FOR VIOLATION
of U.S.C. Title 21, Section 841(a)(1)

Before Olga Jurco, 219 South Dearborn, Chicago, Illinois, The undersigned complainant being duly sworn states:

That on or about January 12, 1977, at Chicago in the Northern District of Illinois, Eastern Division, L. V. Johnson and Frank Adams did knowingly and intentionally distribute a quantity of heroin, a Schedule I Narcotics Drug Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

And the complainant states that this complaint is based on the following:

1. Affiant is a Special Agent of the Drug Enforcement Administration and has been so employed for approximately 5½ years.
2. On January 12, 1977, affiant met with a confidential informant (CI) of the Drug Enforcement Administration whom affiant had observed meet with an individual

outside the Michigan Inn Motel, 3536 South Michigan Avenue, Chicago. The CI has previously purchased narcotics for the Drug Enforcement Administration on three occasions.

3. The CI gave affiant approximately two ounces of a brown powdery substance which, when field tested by affiant, produced a positive reaction for the presence of heroin. The CI informed affiant that the CI had given the individual with whom he met $2,400 of previously recorded United States currency at about 10:15 p.m. and in return received the two ounces of heroin.
4. Said individual was observed by affiant and other DEA agents enter the Michigan Inn Motel and Special Agent Eddie Hill has informed affiant that the individual entered Room 233 of said motel at approximately 10:15 p.m. prior to the last meeting with the CI.
5. At approximately 11:00 p.m., Special Agent Saul Weinstein walked past Room 233 and heard an unknown male say, "Hey, man, let's get out of here, we're done." At approximately 11:15 p.m., Drug Enforcement Administration agents entered Room 233 and announced their office.
6. L. V. Johnson was found to have $510 in his possession which currency matched the lists of pre-recorded funds affiant gave to the CI. Frank Adams was found to have $1,600 in his possession which currency matched the lists of pre-recorded funds affiant gave to the CI.

/s/ Kenneth J. Labik
Special Agent,
Drug Enforcement Administration

APPENDIX F

Name of Presiding Judge,
Honorable Alfred Kirkland

Cause No. 77 CR 33 Date July 18, 1978

Title of Cause: USA -v- L. V. Johnson

Brief Statement of Motion: Motion for leave to file §2255 petition, instanter and treat same as a Rule 33 motion.

Names and Addresses of moving counsel: Allan A. Ackerman, 100 North LaSalle Street, Chicago, Illinois.

Representing: L. V. Johnson

Names and Addresses of other counsel entitled to notice and names of parties they represent: L. Nixon and Al Moran, both AUSA, 219 S. Dearborn Street, 15th Floor, Chgo., Ill. 60604.

GROUP APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 77 CR 33

UNITED STATES OF AMERICA, Plaintiff-Respondent,

v.

L. V. JOHNSON, Defendant-Petitioner.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on petitioner's Motion to Vacate Sentence and on respondent's Motion to Dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Jurisdiction is predicated on 28 U.S.C. §2255.

Because respondent's Motion to Dismiss is pursuant to Rule 12(b)(6), and because matters outside the pleadings were presented and not excluded by the Court, this Court treats respondent's Motion to Dismiss as one for Summary Judgment, as provided in Rule 56, Federal Rules of Civil Procedure.

On January 12, 1978, petitioner was sentenced by this Court to a two year custodial sentence with a three year special parole term to follow. Petitioner now seeks vacation of the judgment of conviction.

Petitioner contends that he was denied due process and his right to a fair trial. Petitioner claims that he received an unfair trial because he was denied "effective and conflict free" counsel in violation of the Sixth Amendment to the United States Constitution.

Petitioner alleges that his attorney told him that an eyewitness could not testify because of a conflict of interest with the attorney's office. Because the eyewitness failed to testify, petitioner claims that his counsel was ineffective.

A motion to vacate sentence pursuant to 28 U.S.C. §2255 may not be granted on a party's unsupported allegations. As the Court noted in *Catalano v. United States,* 185 F. Supp. 463, 464 (E.D. N.Y. 1959):

> Since the creation of Title 28 U.S.C. §2255, certain rules of interpretation have become clear. . . . A petitioner's allegations supported only by his own assertions are insufficient. *United States v. Mathison,* 159 F.Supp. 811, 813 (E.D. Wis. 1958).

Although petitioner's claim is presented as a constitutional issue which is cognizable under Section 2255, the claim is not supported by factual allegations. In fact, the affidavit attached to petitioner's motion specifically states that there was *no* conflict of interest between any eyewitness and petitioner's attorney's law firm.

Without facts to support petitioner's allegations of a "conflict of interest," this claim rests solely on the allegation that counsel was ineffective because the eyewitness was not called to testify. A petitioner asserting a lack of effective assistance of counsel in a criminal case must prove that his counsel's performance did not meet "a minimum standard of professional representation." *United States ex rel. Williams v. Twomey,* 510 F.2d 634 (7th Cir. 1975); *Matthews v. United States,* 518 F.2d 1245 (7th Cir. 1975); *United States ex rel. Ortiz v. Sielaff,* 542 F.2d 377 (7th Cir. 1976).

In the *Williams* case, the Seventh Circuit refused to establish a presumption of failure to meet the constitutional guarantee of assistance of counsel merely because a defendant's attorney makes "egregious errors, tactical or strategic," in not calling potential witnesses. *United States ex rel. Williams v. Twomey, supra* at 640. Without such a presumption, petitioner must offer proof that in failing to call a witness his trial counsel did not meet this "minimum standard of professional representation."

Here, petitioner has offered no such evidence beyond his mere allegations. Further, an alleged failure to call a witness is a question of trial tactics, and generally, a post-conviction attack as to such tactics cannot be found to constitute an unconstitutional deprivation of effective assistance of counsel. *Moran v. Hogan,* 494 F.2d 1220 (1st Cir. 1974). Here, plaintiff demonstrates no reason to depart from this rule. Thus, the failure to call an eyewitness does not entitle petitioner to a new trial even though the witness would have provided an alibi. *United States ex rel. Miller v. Pate,* 342 F.2d 646 (7th Cir.), *reversed on other grounds,* 386 U.S. 1 (1965); *see Estelle* v. *Williams,* 425 U.S. 501 (1976).

Petitioner also alleges that a Government witness testified falsely at trial. However, before perjured testimony can provide grounds for vacating a conviction petitioner must establish that the testimony was false, that it was

material and that it was knowingly and intentionally used by the Government to obtain a conviction. *Steel v. United States,* 400 F.Supp. 41 (E.D. Okla. 1975). Petitioner has the burden of establishing the existence of the foregoing elements. *Holt v. United States,* 303 F.2d 791, 794 (8th Cir. 1962).

Even assuming the testimony of this witness was false, petitioner does not allege that the perjured testimony was knowingly, willfully and intentionally used by the prosecution. His allegations, therefore, are insufficient to impose any obligation on the Court to conduct an evidentiary hearing. *Scott v. United States,* 545 F.2d 1116 (8th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977); *see also Harris v. United States,* 436 F.2d 591 (10th Cir. 1971).

Petitioner's final claim, that he did not make a knowing and intelligent waiver of a jury trial, is currently on direct appeal to the Seventh Circuit. "It is firmly established that the remedy provided by Title 28 U.S.C.A. §2255 cannot be used to serve the functions and purposes of an appeal." *Holt v. United States, supra,* at 793; *see also Campbell v. United States,* 355 F.2d 394 (7th Cir. 1966) and *United States v. Duhart,* 511 F.2d 7, 8 (6th Cir. 1975).

Accordingly, petitioner's Motion to Vacate Sentence is denied. Respondent's Motion to Dismiss, treated as a Motion for Summary Judgment, is granted.

Enter:

/s/ Alfred Y. Kirkland
Judge

Dated: Dec. 4, 1978